Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 5 | Issue 8 Article 10

5-1930

Wills-Devise Over on Decease of First Taker-Construction

WILLS—DEVISE OVER ON DECEASE OF FIRST TAKER—CONSTRUCTION—The will of testatrix provided: "I give, devise and bequeath as follows, that is to say, I give to my beloved 'Step' daughter Lillie B. Ratcliff of Owen county, for love and affection, also considering her care and attention to me in my declining years, also to give George Taylor (colored) for services rendered as a faithful servant for more than forty years:

"To each of them I give $1,000 out of any money of which I may die possessed. Also in connection with the foregoing I give to said Lillie Belle Ratcliff and George Taylor (colored) the following described real estate provided, however, none of the before described land shall be sold during the natural life of said George Taylor, but that the said Lillie Bell Ratcliff shall provide for the said George Taylor a home during his natural life and at his death it shall be the property of the aforesaid Lillie B. Ratcliffe and her heirs forever.

"I direct that the following described lands . . . be sold and that the proceeds . . . be divided into three equal shares and that one share be given to my beloved 'Step' daughter Lillie Belle Ratcliff, and that one share be given to my son-in-law James E. Champer of Greencastle, Indiana, and one share to George Taylor. Now if the said Lillie Belle Ratcliffe shall decease then her heirs shall receive her share, provided they shall carry into effect the provisions of this will.

"If the said James E. Champer and his wife shall decease, then the said Lillie Belle Ratcliff shall receive his share, or her heirs if she be not living.

"The purpose of this gift to the said George Taylor (colored) is that he may be provided with a comfortable home and living during his natural life but after his death . . . then . . . it shall become the property of the aforesaid Lillie B. Ratcliff to be hers and her heirs for ever after."

James E. Champer, and his wife (who was his sole heir) died after testatrix, and the appellant Lillie B. Ratcliff claimed a remainder in the ⅓ share which had been given the Champers, on the ground that (1) considering the rest of will, testatrix intended a life estate only in James E. Champers, and (2) that the words "if the said James E. Champer and

his wife shall decease" refer to their death *at any time*, either before or after the death of testatrix. Demurrer was sustained.

Held, affirmed. *Ratcliffe v. Kreigh*, 170 N. E. 354, — App. —.

The Appellate Court relied upon two rules of construction: First, that if it is possible to do so, a will will be construed so as to vest the entire estate at the time of testator's death. Second, that a devise over upon the first taker's death will be construed to mean such death within the lifetime of testator.

The first rule of construction is elementary. The second one has been relied upon by the Indiana courts many times, and it may be said that the Appellate Court had ample authority for its position on this point. *Fowler v. Duhme*, 143 Ind. 248; *Alfred v. Sylvester*, 184 Ind. 542.

However, the Appellate Court has in the past taken the position that the rule is merely one of construction, and that slight evidence from the language of the will is sufficient to defeat the rule. *Vaubel v. Lang*, 81 App. 432. The better opinion seems to be that the rule of construction will yield in all cases to a different intention fairly taken from the entire will. Tiffany, Real Property, 2d Ed. Vol. 1, Sec. 166.

It seems to us that in the present case, the general testamentary scheme, as gathered from the whole will, was to give a life estate only to the son-in-law Champer; that the court should not have applied the above rule of construction in this case. The testatrix made three principal dispositions. The first was a $1,000 bequest to appellant and to the negro servant. The second was of the house, which was given to the appellant and the servant, but with the careful provision that upon the death of the servant the property was to go to appellant "and her heirs forever." The third disposition (which is in dispute) creates three shares, one to appellant, one to Champer, and one to the servant. Testatrix then provided that if appellant should die, *her heirs* should receive her share; if Champer and his wife should die, then appellant to take his share *"or her heirs if she be not living."* Then the testatrix proceeds to qualify the gift of the share to the servant by providing for a remainder after his death to appellant *"and her heirs forever."* In no instance except where applying to the *appellant*, does the testatrix use the words "heirs" or similar language. It would seem, from the relationship of the parties, from the evident desire of testatrix to reward the appellant for "her care and consideration to me in my declining years," and from the fact that each gift to another person ends up with a remainder to the appellant, that testatrix intended that all the property should eventually come into the possession of the appellant. The condition of the gift over is "if . . . Champer *and his wife* shall decease." It could hardly be said that the testatrix contemplated the death of both Champer and his wife before her own.

The Supreme Court of Indiana has in the past apparently taken the position that the rule is to be applied without inquiring into the actual intention of the testator. (Vol. III, Indiana Law Journal, p. 630.) Perhaps the Appellate Court is now more in accord with that position.

C. W. W.